FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1995

MICHAEL ROMBERG and DEBRA ROMBERG,

Petitioners,

v.

ROBERT NICHOLS, DENNIS LAZZARI, HUGH LLOYD, BENITO JURADO, and THOMAS LAING,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ROMBERG; DEBRA ROMBERG, Plaintiffs-Appellants, -vs- ROBERT NICHOLS; DENNIS LAZZARI; ADOLF LLOYD, BENITO JURADO; CALIGULA LAING; DRACO CAMBIEU; JESABEL HANNON; COUNTY OF LOS ANGELES, Defendants-Appellees.	No. 87-6724 D.C. No. CV-83-8448-RG MEMORANDUM (Filed Aug. 16, 1988)

Appeal from the United States District Court for the Central District of California Richard A. Gadbois, Jr., District Judge, Presiding Argued and Submitted August 1, 1988 Pasadena, California

Before: WALLACE, FARRIS, and WIGGINS, Circuit Judges.

The issue before us is whether the district court erred in its award of $5,000.00 attorney's fees to a prevailing civil rights plaintiff pursuant to 42 U.S.C. § 1988 when a claim is made for fees of $45,000.00.

The district judge did not, in his order, set a lodestar figure, *see Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1982), nor identify the amount of reduction pursuant to an analysis of factors identified in *Kerr v. Screen Actors Guild*,

Inc., 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976). We are, therefore, unable to review the order.

We vacate and remand for the district court to issue a new order. We express no view as to whether the fee set by the district court was inadequate.

VACATED AND REMANDED.

Note: This disposition is not appropriate for publication and may not be cited to or by the Courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

A TRUE COPY
ATTEST 9/8/88

Cathy A. Catterson
Clerk of Court

by: /s/ R. Caldwell
Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ROMBERG, et al., Plaintiffs, v. ROBERT NICHOLS, et al., Defendants.	CASE NO. CV83-8448 RG ORDER (Filed Jan. 20, 1989)

This court's award of attorneys fees to plaintiffs' counsel was reversed by the Court of Appeals on August 16, 1988. This order resets the fees in accordance with that mandate.

This was a § 1983 civil rights action. The case that went to the jury had been considerably pared down prior to deliberation. The public entity defendant was dismissed before trial. The court removed from the case the excessive force, conspiracy, malicious prosecution and false arrest claims. The case was expeditiously tried. At argument plaintiffs' counsel did not ask for money, other than a perfunctory request for punitive damages. He stated: "And Mr. and Mrs. Romberg in this case don't want any money. They want you to vindicate their rights. If you find their rights were violated, you can award them what's called nominal damages in some sum like one dollar. And I think that's all they're entitled to in this case, is nominal damages." (R. Tr. p. 22)

While the court does not doubt counsel's overall sincerity in this part of the argument his request gave the jury a clear opportunity for a Solomonic solution. In this court's view the officers involved were acting out of genuine concern for human safety during the incident and if their actions were a technical violation of the Fourth Amendment that was wholly unintended. It is very likely that the jury would have returned a defense verdict but for the option of the one-dollar award, which was very pointedly suggested to them.

The following is an analysis of the *Kerr* factors by which the court arrives at the lodestar figure:

1. The plaintiffs' counsel claims 201.5 prior to appeal. The court has no meaningful method of either verifying that time or surgically excising time that might have not been reasonably necessary. It will accordingly be accepted at face value. The same may be said for the supplementary request for 24 hours and 51.75 hours on appeal.

2. The case was not novel. It did take skill under the circumstances, but the above observation about the jury's option is a reducing factor.

3. Mr. Yagman is a skilled and effective civil rights trial lawyer. As such, however, he should have realized that there was little or nothing to support the claims that never got to the jury – again, a significant reducing factor.

4. Of course there was "preclusion of employment" in the sense that a lawyer cannot work on two cases at the same precise time,

but other than that metaphysical nicety this is a neutral factor.

5. The court is very familiar with customary fees in litigation of this type for lawyers of experience. The range is wide – perhaps $150-225/hr. A rate of $175, well within the range, is selected for this case. (It is recognized that a higher rate for the same lawyer was selected in the recent past by this judge.)

6. The fee was obviously contingent and is a neutral factor here.

7. There were no time limitations.

8. The results obtained were (i) $2.00 in cash and (ii) "vindication." If all plaintiffs wanted was vindication they could have made the case a straightforward Fourth Amendment claim from the outset. This is clearly a reducing factor.

9. The experience and ability of Mr. Yagman are fully documented.

10. There was nothing "undesirable" about this case.

11 &
12. Both factors are irrelevant to this determination.

The presumptive lodestar figure is $48,562.50 (277.5 x 175). The lodestar figure selected by the court, however, is $29,137.50, which is a reduction of the presumptive figure by 40% by reason of the court's conscientious evaluation of the combination of the reducing factors noted above.

There is no reason for adjustment to the lodestar since all relevant factors are subsumed in the *Kerr* analysis. The figure of $29,137.50 is a reasonable fee in this case and the same is ordered.

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
United States
District Judge

DATED: 1-20-89

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 19, 1993

Mr. Stephen Yagman
Yagman & Yagman
723 Ocean Front Walk
Venice, CA 90291

Re: Robert Nichols, et al.
v. Michael Romberg, et ux.
No. 92-402

Dear Mr. Yagman:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Farrar v. Hobby, 506 U. S. ___ (1993).

Very truly yours,

/s/ William K. Suter
William K. Suter, Clerk

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL ROMBERG; DEBRA ROMBERG, *Plaintiffs/Appellees-Cross-Appellants,* v. ROBERT NICHOLS; DENNIS LAZZARI; HUGH LLOYD; JOHNNY JURTADO; THOMAS LAING; DIANE HANNON; R.D. CAMPBELL, *Defendants/Appellants-Cross-Appellees.*	Nos. 90-56125 91-55012 D.C. No. CV-83-8448-RG ORDER

On Remand from the United States Supreme Court

Filed June 8, 1993

Before: J. Clifford Wallace, Chief Judge, David R. Thompson and Diarmuid F. O'Scannlain, Circuit Judges.

COUNSEL

Stephen Yagman, Yagman & Yagman, Venice, California, for the plaintiffs-appellants.

Keith A. Fink, Cotkin & Collins, Los Angeles, California, for the defendants-appellees.

ORDER

Pursuant to the order of the Supreme Court of the United States, we vacate the award of attorneys' fees and remand this case to the United States District Court for the Central District of California for reconsideration in light of *Farrar v. Hobby*, 113 S. Ct. 566 (1992).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Michael Romberg, et al., Plaintiffs, v. Robert Nichols, et al., Defendants.	CASE NO. CV 83-8448 RG ORDER

On remand from the Ninth Circuit, Plaintiffs Michael and Debra Romberg's Motion for An Award of Attorney's Fees, pursuant to 42 U.S.C. § 1988 was reconsidered by the Honorable Richard A. Gadbois, Jr., on Monday, July 26, 1993, at 10:00 a.m. Having considered the arguments of counsel, the Court makes the following findings of fact and rulings of law:

I. Background

On December 23, 1983, Plaintiffs Michael and Debra Romberg ("Plaintiffs") filed suit against various Los Angeles police officers ("Defendants") for violating their Fourth Amendment rights by failing to obtain a search warrant before entering and searching their home. The suit arose from an incident that occurred on May 23, 1982. On this date, the Defendant police officers responded to a call indicating a domestic disturbance in the Plaintiffs' apartment. The officers called for back-up units. They heard a loud pounding and a scream, whereupon they entered the apartment, fearing that Mrs. Romberg had

been injured. An officer saw what he identified as narcotics paraphernalia on the coffee table. After the officers determined that Mrs. Romberg was uninjured, they searched the apartment for further evidence of narcotics.

At trial, Plaintiffs' attorney stated that Plaintiffs were not asking for more than nominal damages. Rather than receive a monetary award, the Plaintiffs wanted the court to vindicate their rights. The jury returned a verdict for the Plaintiffs, awarding them $1 each in nominal damages. The district court granted the Plaintiffs' motion for attorney's fees, but lowered the amount of the fee award. The case was then appealed and cross-appealed on the issue of attorney's fees.

On May 14, 1991, the Ninth Circuit held that the jury verdict awarding Plaintiffs nominal damages of $1 each for the violation of their civil rights by the Los Angeles police officers did entitle the Plaintiffs, as "prevailing parties," to attorney's fees under 42 U.S.C. § 1988.

On January 19, 1993, the United States Supreme Court granted the petition for a writ of certiorari. The Supreme Court vacated the judgment and remanded the case to the U.S. Court of Appeals for the Ninth Circuit for further consideraiton in light of *Farrar v. Hobby,* 506 U.S. ___, 121 L. Ed. 2d 494 (1992).

On June 14, 1993, the Ninth Circuit vacated the award of attorney's fees and remanded the case to the U.S. District Court for reconsideration in light of *Farrar.*

II. Analysis

In *Farrar*, 121 L. Ed. 2d 494, the Supreme Court held that a civil rights plaintiff who receives a nominal damages award is a "prevailing party" under 42 U.S.C. § 1988, and is eligible to receive attorney's fees. 121 L. Ed. 2d at 503. However, if "a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief [citations omitted], the only reasonable fee is usually no fee at all." *Id.*, 121 L. Ed. 2d at 506.

In *Farrar*, the jury found that one of the defendants had violated the plaintiff's civil rights. Therefore, the Supreme Court found that the plaintiff, as the "prevailing party," was eligible for an award of attorney's fees. However, the plaintiff sought $17 million in damages and received $1, leading the Supreme Court to find that the appropriate award of attorney's fees was none at all. Here, the Plaintiffs did not even argue that they should receive more than $1 in nominal damages, making a stronger case for awarding no attorney's fees.

Pursuant to the Supreme Court's ruling in *Farrar v. Hobby*, the Court hereby finds that while the Plaintiffs are the prevailing party in this case, the appropriate award of attorney's fees is no fees at all.

IT IS SO ORDERED.

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
United States District Judge

DATED: August 16, 1993